

PP v. MUHAMMAD NOR AZMIL KHAIRUDDIN

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HIGH COURT MALAYA, SHAH ALAM
COLLIN LAWRENCE SEQUERAH JC
[CRIMINAL APPEAL NO: 42LB-17-03-2014]
3 NOVEMBER 2014

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CRIMINAL LAW: Penal Code – Section 376 – Rape – Appeal – Victim under 16 years of age – Essential ingredients of charge – Whether established – Whether failure to produce analysed exhibits in court fatal to prosecution’s case – Whether prosecution established case beyond reasonable doubt – Penal Code, s. 376

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CRIMINAL PROCEDURE: Appeal – Appellate intervention – Statutory rape – Whether elements required to constitute offence of statutory rape considered – Whether appellate interference warranted

EVIDENCE: Corroboration – Rape – Statutory rape – Victim under 16 years of age – Whether victim’s evidence of sexual intercourse credible – Whether requirement of corroboration a mere rule of prudence – Whether victim’s testimony sufficiently corroborated

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EVIDENCE: Presumptions – Adverse inference – Rape – Identity of offender sufficiently proven – Whether additional witnesses should be called to establish identity of offender – Whether adverse inference arising – Whether suppression or withholding of material witnesses – Evidence Act 1950, s. 114(g)

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The respondent was charged in the Sessions Court for two charges of offence of rape of a minor (‘PW2’) under s. 376(1) of the Penal Code. On the day in question, PW2 and PW3 had followed the respondent’s younger brother (‘Iwan’) for a celebration. While on the way back, PW2 and PW3 switched cars from Iwan’s car to the respondent’s car. On the way, the respondent stopped his car and ordered everyone out of the car except PW2. The respondent and five of his friends then raped PW2. PW3 testified that she did not witness or hear what happened but she saw the respondent’s friends going in and out of the respondent’s car. The doctor who had examined PW2 (‘PW5’) testified that there were old tears to PW2’s hymen and that there were no fresh tears. The chemist (‘PW13’) testified that the DNA results on the semen stains on the car’s carpet did not match the respondent’s DNA. PW13 also testified that the result of external examination on pubic hair and hair samples found in the car together with the pubic hair samples from PW2 showed that was a possibility that they were from the same source but also the possibility that it was from another source. The investigating officer (‘PW9’) testified that he kept the exhibits of the case which he received from the Chemist Department in a steel drawer in his office but the steel drawer was not locked. The case exhibits were no longer in the steel drawer after PW9 went on transfer and he failed to locate the exhibits. The respondent was acquitted without his defence being called. The prosecution appealed against the acquittal on the grounds that the Sessions Court Judge (‘SCJ’)

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- A erred in: (i) failing to take into account PW2's evidence who testified that she was raped by the respondent twice that day; (ii) holding that the failure of the prosecution to call as witnesses persons by the name of Iwan and Mohd Fazil had prejudiced the prosecution's case as they were material witnesses; (iii) failing to consider the evidence of SP3 as material corroborative evidence as she was at all material times present with SP2 during the incident; (iv) holding that the failure to produce the exhibits was material without considering the fact that the exhibits had already been analysed by the chemist.
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Held (allowing appeal; remitting matter back to Sessions Court for defence to be called):

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- (1) The prosecution had to prove the ingredients of the offence of rape which in this case were as follows: (i) the accused had sexual intercourse with the woman in question; (ii) the sexual intercourse took place under circumstances falling under any one of the five paragraphs to s. 375 of the Penal Code; (iii) there was penetration; (iii) the victim was not the wife of the accused or if she was his wife, she was under 16 years of age at the material time. (para 13)
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- (2) PW2 was under the age of 16 years. Consent was therefore not an issue in respect of the charge against the accused. (para 14)
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- (3) It is not essential that the hymen should be ruptured, provided it is clearly proved that there was penetration even though partial. For the offence of rape to be committed, it is not necessary that there should be complete penetration. (para 15)
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- (4) PW2 was no stranger to the act of sexual intercourse, having admitted to the fact that she had previously engaged in sexual intercourse with her ex-boyfriend. Being familiar with the act of engaging in sexual intercourse, PW2 was therefore able to narrate in some detail the sexual act that was performed on her by the respondent and his other friends that night. Had the SCJ taken all of this into account she would have held that the evidence of PW2 in this respect was credible. (para 17)
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- (5) The presence of semen is not a requirement by law to prove rape. For the offence of rape, what is required is penetration and not ejaculation. Hence, evidence of absence of seminal emission was not fatal to the prosecution case. Based on PW2's evidence, there was penetration to the vagina of the accused; *PP lwn. Mohamad Malek Ridhzuan Che Hassan* (refd). (paras 20 & 22)
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- (6) It is trite that in cases involving sexual assault, the evidence of the complainant must be corroborated. This is however, a rule of prudence. PW3 had testified that she was present at the scene where the rape occurred. Although she was not able to witness the rape as she was ordered to leave the car, she stood no more than about 18 feet
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- away. Her testimony corroborated the testimony of PW2. Further, PW2's friend ('PW6') testified that he received a phone call from PW3 asking for his help to come and get PW2. PW6 testified that PW2 told him that she was raped by persons unknown to her. (paras 23, 28 & 29) A
- (7) PW5 testified that where there are presences of old tears, the possibility of finding fresh tears are remote and the probability is slim. The evidence of PW5 in this respect was consistent with the evidence of PW2 who testified that she had previously had sexual intercourse with her ex-lover. PW5 in cross-examination disagreed with the suggestion that PW2 had not been raped. (para 30) B
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- (8) PW13 testified that the strands of pubic hair recovered from the back of the car were morphologically similar to the external characteristics of pubic hair belonging to PW2. This supported the testimony of PW2 to the extent that she said that her trousers and panties were pulled down during the rape and that would account for the presence of her pubic hairs being found as pubic hair does not normally just shed by itself. (para 31) D
- (9) Since the identity of the respondent had been sufficiently proven, it could not be said that Iwan and Fazil were material witnesses to the case. It is trite law that s. 114(g) of the Evidence Act 1950 only applies in cases when there is suppression or withholding of material witnesses. Further, the fact that the rape took place was sufficiently given in evidence by PW2 and PW3 and the non-calling of both these individuals could not have prejudiced the prosecution's case; (*Munusamy Vengadasalam v. PP*, refd). (para 35) E
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- (10) In the light of the fact that the exhibits were already analysed by the chemist, the failure to produce the exhibits in court during trial was not fatal to the prosecution's case; (*Gunalan Ramachandran & Ors v. PP*, refd). (para 37) G
- (11) There was little or no analysis at all of the evidence of the prosecution witnesses. The elements required to constitute the offence of rape and statutory rape were not considered in the grounds of judgment and no evaluation was carried out on the evidence in order to come to the finding that the prosecution had failed to make out a *prima facie* case against the accused. (para 47) H

Case(s) referred to:

- Ah Mee v. PP* [1967] 1 LNS 3 FC (refd)
Aziz Muhamad Din v. PP [1997] 1 CLJ Supp 523 HC (refd)
Balachandran v. PP [2005] 1 CLJ 85 FC (refd) I
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA (refd)
Din v. PP [1964] 1 LNS 33 FC (refd)
Lim Teng Leng @ Mohd Iskandar Abd v. PP [1998] MLJU 152 (refd)

- A** *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 CA (*refd*)
Mohamad Terang Amit v. PP [1999] 5 CLJ 156 HC (*refd*)
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC (*refd*)
P'ng Hun Sun v. Dato' Yip Yee Foo [2013] 1 LNS 320 CA (*refd*)
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC (*refd*)
PP v. Mardai [1949] 1 LNS 65 HC (*refd*)
- B** *PP lwn. Mohamad Malek Ridhzuan Che Hassan* [2013] 8 CLJ 359 CA (*refd*)
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC (*refd*)
PP v. Tan Sri Kasitah Gaddam [2009] 1 LNS 741 HC (*refd*)
R v. Turnbull [1977] QB 224 (*refd*)
Razi Amin v. PP [2010] 7 CLJ 771 HC (*refd*)
Thavanathan Balasubramaniam v. PP [1997] 3 CLJ 150 FC (*refd*)
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Legislation referred to:

Criminal Procedure Code, ss. 173(f), 180(4)
Evidence Act 1950, s. 114(g)
Penal Code, ss. 375, 376(1)

D Other source(s) referred to:

Mallal's Criminal Procedure, 7th edn, pp 393 & 394
Modi, Medical Jurisprudence and Toxicology, 21st edn, p 369
Ratanlal & Dhirajlal's Law of Crimes, 27th edn, vol 2, pp 2317, 2329, 2334

For the appellant - Faten Hadni; DPP

E *For the respondent - Samantha Chong; National Legal Aid Foundation*

[Appeal from Session Court; Criminal Case No: SA3-62-207-08-12]

Reported by Amutha Suppayah

F **JUDGMENT**

Collin Lawrence Sequerah JC:**Introduction**

- G** [1] The respondent in this appeal was charged in the Sessions Court at Klang for two charges for the offence of rape under s. 376(1) of the Penal Code. On 11 March 2014 he was acquitted without his defence being called on both charges. This is an appeal brought by the prosecution against that decision.

H **The Charge**

- I** [2] First charge (translated from Bahasa Malaysia):

That you on 15.9.2010 between the hours of about 12.30am until 1.30am in a black colour Mercedes motor vehicle bearing registration no. PBL 578 at the oil palm estate in Jalan Tebuk Baru, Bagan Terap, Sabak Bernam in the district of Sabak Bernam, in the state of Selangor, did commit rape of XXX NRIC: XXX aged 15 years and 11 months. You have thereby committed an offence under Section 376(1) Penal Code punishable under the same section.

[3] Second charge (translated from Bahasa Malaysia):

That you on 15.9.2010 between the hours of about 1.30am until 2.30am in a black colour Mercedes motor vehicle bearing registration no. PBL 578 at the oil palm estate in Jalan Tebuk Baru, Bagan Terap, Sabak Bernam in the district of Sabak Bernam, in the state of Selangor, did commit rape of XXX NRIC: XXX aged 15 years and 11 months. You have thereby committed an offence under Section 376(1) Penal Code punishable under the same section.

Facts Of The Case

[4] The brief facts of the case disclose that on the day in question, both XXX, PW2, who was the complainant, and Mazura binti Saidi, PW3, had followed one Iwan to his friend's place for a celebration. Iwan is the younger brother of the respondent. While on the way, the respondent also followed in another car, a Mercedes.

[5] According to PW2 and PW3, after attending the celebration and while on the way back, they sat in Iwan's car and at some point later on they switched cars and sat in the respondent's car. While on the way back, the respondent stopped his Mercedes car next to a 'kunci air' (water lock) and ordered everyone out of the car except PW2. According to PW2, the respondent then invited her to partake in sexual intercourse but PW2 refused. PW2 then testified that the respondent used force on her and she felt the respondent insert his penis into her vagina. PW2 testified that even though the surrounding area had no light, it was a moonlit night and she could see her surroundings faintly.

[6] PW3 testified that she did not witness or hear what happened but she saw the respondent's friends going in and out of the respondent's car. The distance of PW3 to the car was about 18 feet. PW3 said that PW2 was normal when she alighted from the Mercedes car but that she was holding back her tears. PW2 told the court that apart from the respondent who raped her twice, five of his friends also took turns to rape her that night.

[7] PW5 was the doctor who had examined PW2 and testified that there were old tears to the hymen at the 3 o'clock and 7 o'clock positions. PW5 also told the court that in the case of PW2 who was referred less than 72 hours, sometimes there would be fresh tears but if there were old tears, it meant that the vagina was loose. In those cases it was difficult to find fresh tears to the hymen. PW5 testified that in this case there were no fresh tears. PW5 also said that if the victim had an old tear but was referred less than 72 hours, there was still a possibility that there would be a fresh tear but the possibility was less than 5%. PW5 further testified that if someone was raped by five people, there was a big possibility that there would be fresh tears and in different positions. In response to the question, if there were old tears but if 'penetration' had recently taken place, would there be any evidence of that penetration, PW5 replied that often there would be abrasions, redness and

A so on but in this case she did not see any evidence of that. PW5 also testified that in this case there were no traces of 'positive seminal fluid analysis' for PW2.

[8] PW13 was the chemist who testified that the results of analysis showed that according to the DNA results on the semen stains done on a section of the carpet in the Mercedes car, there was a male DNA profile but it did not match with the DNA of the respondent's blood, the nail clippings of PW2 also did not have any male DNA profile and no DNA analysis was done on the hair labelled F because it had no root present. PW13 also testified that the result of external examination on pubic hair and hair samples found in the Mercedes together with the pubic hair samples from PW2 showed that was a possibility that they were from the same source but also the possibility that it was from another source.

[9] PW9 who was the investigating officer of the case testified that he kept the exhibits of the case which he received from the chemist department in a steel drawer in his office but the steel drawer was not locked. He further testified that the case exhibits were no longer in his steel drawer after he went on transfer to Pulau Pinang and he failed to locate the exhibits.

Grounds Of Appeal

E [10] There are five grounds of appeal raised by the prosecution in their petition of appeal and in summary they are as follows:

- (i) The Sessions Court Judge (SCJ) erred in acquitting and discharging the respondent of both charges at the end of the prosecution case.
- F (ii) The SCJ erred in failing to take into account the evidence of prosecution witness no. 2 (PW2) who testified that she was raped by the respondent twice that day.
- (iii) The SCJ erred in holding that the failure of the prosecution to call as witnesses persons by the name of Iwan and Mohd Fazil had prejudiced the prosecution case as they were material witnesses.
- G (iv) The SCJ erred when she failed to consider the evidence of SP3 as material corroborative evidence as she was at all material times present with SP2 during the incident.
- H (v) The SCJ erred when she held that the failure to produce the exhibits was material without considering the fact that the exhibits had already been analysed by the chemist.

Ingredients Of The Offence Of Rape

I [11] In so far as is relevant for the purposes of this appeal, the punishment for the offence of rape is set out in s. 376 of the Penal Code and reads as follows:

376. Punishment for rape

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- (1) Subject to subsections (2), (3) and (4), whoever commits rape shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping
- (2) Whoever commits rape on a woman under any of the following circumstances:
 - (d) without her consent, when she is under sixteen years of age shall be punished with imprisonment for a term of not less than five years and not more than thirty years and shall also be liable to whipping.

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[12] The offence of rape itself is set out in s. 375 as follows:

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375. Rape

A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

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- (g) with or without her consent, when she is under sixteen years of age.

Explanation – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

[13] The prosecution must therefore prove the ingredients of the offence of rape which in this case is as follows:

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- (i) The accused had sexual intercourse with the woman in question;
- (ii) The sexual intercourse took place under circumstances falling under any one of the five paragraphs to s. 375;
- (iii) There was penetration;
- (iv) The victim was not the wife of the accused or if she was his wife, she was under sixteen years of age at the material time.

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See *Ratanlal & Dhirajlal's Law of Crimes*, 27th edn, vol. 2 at p. 2329.

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Have The Prosecution Proven The Ingredients Of Rape?*Victim And Complainant Under Sixteen Years Of Age*

[14] In this case the fact that the victim, prosecution witness no. 2 (PW2) was under the age of sixteen years was proven by her own testimony and through the tendering of her birth certificate no. J 938019 marked as exh. P2 at the trial before the Sessions Court. Further, from a perusal of the record of appeal, the NRIC no. of PW2 is stated at the outset of her sworn testimony as 941009-10-5234 clearly indicating her age at the time of the commission of the offence. Consent was therefore not an issue in respect of the charge against the accused.

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A Sexual Intercourse Took Place And There Was Penetration

- [15] The explanation to s. 375 states that penetration is sufficient to constitute rape. To constitute penetration it must be proved that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. The only thing to be ascertained is whether the private parts of the accused did enter into the person of the woman. It is not necessary to decide how far they entered. It is not essential that the hymen should be ruptured, provided it is clearly proved that there was penetration even though partial. For the offence of rape to be committed, it is not necessary that there should be complete penetration. The word “penetrate” according to the *Concise Oxford Dictionary* means “find access into or through, pass through”. See *Ratanlal & Dhirajlal’s Law of Crimes*, 27th edn, vol. 2 at p. 2317.

Evidence Of The Complainant, PW2

- D [16] PW2 testified that on the night of the incident, while she was in the Mercedes car driven by the accused and after her friend, PW3, was pulled out of the car, she was forcibly raped by the respondent who she said, had inserted and penetrated her vagina. PW2 testified that she felt the respondent’s penis enter her vagina and even though the surroundings were not well lit, it was a moonlit night and therefore she could faintly see the surroundings. PW2 then testified that the respondent after that also asked his friends to enter the car and have sexual intercourse with her.

- F [17] In this respect, it is to be noted that PW2 was no stranger to the act of sexual intercourse, having admitted to the fact that she had previously engaged in sexual intercourse with her ex-boyfriend. Being familiar with the act of engaging in sexual intercourse, PW2 was therefore able to narrate in some detail the sexual act that was performed on her by the respondent and his other friends that night. This is amply borne out from the notes of proceedings of the evidence of PW2 in the record of appeal. PW2 was able to describe in some detail how the respondent had forced himself upon her.
- G She described how the respondent had lifted up her blouse and pulled down her trousers until her knees. While pulling her trousers down he pulled of her panties at the same time. PW2 also described that the respondent then pulled down his trousers halfway and inserted his penis into her vagina. PW2 was able to describe that the respondent inserted his penis inside her vagina only once for around two to three minutes. After that PW2 testified that the respondent ejaculated his semen outside her vagina and onto the car and that he used a cloth to wipe the semen off. PW2 described how the respondent then exited the car through the rear right hand side door after which she then put her clothing back on. PW2 then described in detail how the friends of
- I the respondent then entered the car and forced themselves upon her. She also testified that the respondent also entered the car and raped her for the second time. This time she said the respondent inserted his penis inside her for

around five minutes. PW2 also testified that her friend Mazura, PW3, had opened the door on the left hand side to try to help her but to no avail. Had the learned Sessions Court Judge taken all of this into account she would have held that the evidence of PW2 in this respect was credible.

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Absence Of Traces Of Semen

[18] The learned Sessions Court Judge, in her grounds of judgment, *inter alia*, held that one of the reasons the prosecution had failed to make out a *prima facie* evidence against the respondent was because of the absence of any traces of sperm in the car and in PW2's vagina.

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[19] In that regard, useful reference may be made to "*Medical Jurisprudence and Toxicology*" by Modi, 21st edn, p. 369 and cited in *Ratanlal & Dhirajlal's Law of Crimes*, 27th edn, vol. 2, p. 2334 it states:

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Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one." It goes further to state that the above observations were quoted with approval by the Supreme Court in *Madam Gopal Kakkad v. Naval Dubey* where the court also relied upon Parikh's Textbook of Medical Jurisprudence and Toxicology, wherein it is observed:

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Sexual intercourse – in law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.

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[20] The above observations were also quoted with approval in the case of *PP Iwn. Mohamad Malek Ridhzuan Che Hassan* [2013] 8 CLJ 359; [2014] 1 MLJ 363 where it was held, *inter alia*, that the presence of semen was not a requirement by law in order to prove the offence of rape. For the offence of rape, what was required is penetration and not ejaculation. It is therefore clear that evidence of the absence of seminal emission is not fatal to the prosecution case. What is material is that there is evidence of penetration, however slight.

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[21] In *Razi Amnin v. PP* [2010] 7 CLJ 771; [2010] 7 MLJ 756, it was held that the courts should be practical and adopt common sense principles when dealing with rape. It also held that in rape, the most vital ingredients are, the

A identity of the offender and the sexual act itself ie, fact of penetration however slight. It is not in dispute here that the appellant is the alleged offender.

[22] Based upon the evidence of PW2 therefore, this court was satisfied that there was penetration to the vagina of the accused.

B **Corroboration**

[23] It is trite that in cases involving sexual assault, the evidence of the complainant must be corroborated. This is however, a rule of prudence. It was established as far back as 1964 by Thomson LP in *Din v. Public Prosecutor* [1964] 1 LNS 33; [1964] 1 MLJ 300 where it was held.

If, however, she complains of having been raped then both prudence and practice demand that her evidence should be corroborated.

[24] In the case of *Aziz Muhamad Din v. Public Prosecutor* [1997] 1 CLJ Supp 523; [1996] 5 MLJ 473, Augustine Paul J (as he then was) held:

Although there is no specific rule that requires the evidence of a witness to be corroborated, there is a rule of practice stressing the need for corroboration in rape cases.

[25] Even earlier in *Public Prosecutor v. Mardai* [1949] 1 LNS 65; [1950] 1 MLJ 33, Spenser Wilkinson J said:

Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated, nevertheless it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant's story.

[26] In *Ah Mee v. Public Prosecutor* [1967] 1 LNS 3; [1967] 1 MLJ 220, Ong FJ explained that corroboration in a legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence.

[27] In *Thavanathan Balasubramaniam v. Public Prosecutor* [1997] 3 CLJ 150 at pp. 173-174; [1997] 2 MLJ 401 at pp. 418-419 it was held:

In the celebrated case of *R v. Baskerville* [1916] 2 KB 658, Lord Reading CJ expressed the requirements of corroborative evidence thus (at page 667) "evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

[28] In this case, PW3 had testified that she was present at the scene where the rape occurred. Although she was not able to witness the rape as she was ordered to leave the car, she stood no more than about 18 feet away. Her testimony corroborated the testimony of PW2 when she said that after she was ordered out of the car, PW2 and the respondent were alone in the car

in the back seat. She also said that after sometime the respondent exited from the car after which there were also other persons present who entered the car while PW2 was still in there. She further testified that the respondent then entered the car a second time. This corroborated the evidence of PW2 who also testified that the respondent entered the car a second time and raped her. PW3 further corroborated the evidence of PW2 when she testified that she tried to help PW2 when she went and opened the left hand side door of the car but was unable to do so as she was prevented from doing so. PW3 testified that this took place for about half an hour. PW3 further testified that after that, when PW2 got down from the car, her situation looked normal but PW3 noticed that she was fighting back her tears. PW3 further testified that when PW2 reached her house later, she told her that she had been raped after which she cried in the toilet.

[29] PW6 who was the friend of PW2 testified that he received a phone call from PW2's friend by the name of Mazura, PW3, asking for his help to come and get PW2 from Parit 13. PW6 testified that PW2 told him that she was raped by persons unknown to her.

[30] PW5 was the obstetrician and gynaecology expert from Hospital Tengku Ampuan Rahimah ("HTAR"). She testified that she conducted an examination of PW2 on 15 September 2010. PW5 said that her examination revealed that there were old tears to the hymen at the 3 and 7 o'clock positions. She said there were no fresh tears. She testified that in such a case as this where there were presences of old tears, the possibility of finding fresh tears were remote and the probability was slim. She said that there was only a 5% chance of detecting the presence of old tears as the old tears would give more room and allowance during sexual intercourse. She said that fresh tears were normally seen in cases of individuals who had no tears to the hymen. PW5 went on to testify that the hymen was fairly elastic and it was difficult to detect fresh tears when there were old tears. The evidence of PW5 in this respect was consistent with the evidence of PW2 who testified that she had previously had sexual intercourse with her ex-lover. PW5 in cross-examination disagreed with the suggestion that PW2 had not been raped. In any event, it is trite that the question of whether or not a rape had occurred is a legal one and not a medical one.

[31] PW7 was the forensic officer who testified that as a result of an analysis on the Mercedes car conducted approximately six days after the incident, traces of sperm and ten strands of pubic hair were recovered from the rubber floor mats at the back of the car. These were sent for analysis. PW13, the chemist, gave evidence that DNA analysis was not able to be carried out on the strands of hair found as only the roots would contain DNA and the strands of hair here had no roots. Notwithstanding that, PW13 testified that a microfil analysis was done on the specimen hairs B and C. A microfil analysis is an external examination of the external characteristics of the hair samples. It was found that the external characteristics of the hair

- A samples A to I, as marked by the investigating officer, were morphologically similar to the external characteristics of specimen C which was pubic hair belonging to PW2. PW13 testified that there was a possibility that they had originated from the same source. PW13 testified that the hair sample marked J also had similar characteristics to the hair specimen marked B, belonging to PW2, and there was a possibility that they had originated from the same source. Although PW13 testified in cross-examination that he could not ascertain 100% that the hair belonged to PW2, it nevertheless supports the testimony of PW2 to the extent that she said that her trousers and panties were pulled down during the rape and that would account for the presence of her pubic hairs being found as pubic hair does not normally just shed by itself.

- D [32] In the case of *Lim Teng Leng @ Mohd Iskandar Abd v. PP* [1998] MLJU 152 the conviction of the appellant by the Sessions Court was upheld when the High Court concluded that both the evidence of the child relating the incident of rape to a teacher and the medical evidence that there was penile penetration on account of the presence of fresh tears in the hymen that could have occurred within seven days of the examination, was sufficient evidence of the guilt of the appellant.

- E [33] In *Mohamad Terang Amit v. PP* [1999] 5 CLJ 156; [1999] MLJU 134, the High Court found corroborative evidence of the victim in the testimony of a houseman doing his second year in obstetrics and gynaecology who had examined the girl and found that there was an old hymen tear and that her vagina admitted two fingers easily which a specialist gynaecologist concluded was the result of penile penetration.

- F [34] Based on the foregoing, this court finds that there was ample corroboration of PW2's testimony that she was raped by the respondent on the night in question.

Non-Calling Of Iwan And Fazil

- G [35] The respondent's counsel also formulated the submission that s. 114(g) of the Evidence Act 1950 should be invoked against the prosecution for the non-calling of Iwan and Fazil. This was raised in relation to the identity of the respondent and also the fact that because these two individuals were present during the rape they would be able to shed light on the events that had transpired that night. It was alleged that since PW3 did not witness what had happened in the car, there existed a gap as to the identity of the rapist. Further to this, it was contended, there was a notice of alibi served coupled with the fact that the identification parade was held one year after the incident took place. It was submitted also that PW2 and PW3 did not previously know the respondent. It was urged upon this court that the principles in *R v. Turnbull* [1977] QB 224 in respect of identification evidence should thus apply. By way of reply, the learned Deputy Public Prosecutor submitted that the identification parade was only held after almost a year

because the respondent was only able to be apprehended after a year. Nevertheless, the prosecution submitted, the identification by PW2 and PW3 during the incident was sufficiently strong. The factual matrix of the case shows that PW2 and PW3 had the opportunity to observe the respondent on the day of the incident for quite a long period of time. Both PW2 and PW3 were together with the respondent when they had gone for the celebration from house to house under what must have been sufficiently favourable lighting conditions. This encounter had lasted at least for a couple of hours before the incident. Both PW2 and PW3 had even mentioned the respondent by name and he was positively identified in court as being the rapist. This court was therefore satisfied that the identity of the respondent had been sufficiently proven. In the light of that it cannot be said that Iwan and Fazil were material witnesses to the case. It is trite law that s. 114(g) of the Evidence Act 1950 only applies in cases when there is suppression or withholding of material witnesses. See *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492. Further to this, the fact that the rape took place was sufficiently given in evidence by PW2 and PW3 and the non-calling of both these individuals could not have prejudiced the prosecution's case.

Failure To Produce Exhibits

[36] The final ground of appeal raised by the prosecution was that the learned Sessions Court Judge erred when she held that the failure to produce the exhibits was material without considering the fact that the exhibits had already been analysed by the chemist. This ground was based on the evidence of the original investigating officer, PW9, who testified that when he received the exhibits from the Jabatan Kimia Malaysia after they had been analysed by the chemist, he kept the exhibits in his steel drawer in his office but the drawer was not locked. He further testified that the exhibits were no longer in his drawer after he was transferred to Pulau Pinang and could not trace the exhibits after that. In this regard it is relevant to consider the decision of the Court of Appeal in the case of *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551; [2004] 4 MLJ 489 where it was held:

In a drug trafficking case, it was important to prove that the substance that had been recovered was sent to the chemist for analysis and that the analysis showed that it was heroin or other dangerous drug. Therefore, the chain of evidence was more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then, it did not necessarily mean that if the exhibit was handed from one person to another, every one of them must be called to give evidence regarding the handing over or that if there was a break in the chain of evidence, even for one day, the case would fall ... The fact that there was a gap in the chain of evidence did not necessarily mean that that fact was not proved. It depended on the facts and circumstances of each case ... The next period to consider was from the time that the substance was received

- A back from the chemist until it was produced in court. The chain of evidence in this second period was less important because there was no law requiring the exhibit recovered to be produced in court or that if the exhibit was not produced in court, the prosecution's case must necessarily fall. The prosecution's case may or may not fall depending on the facts and the circumstances of each case. Here, the learned trial judge had dealt
- B at length on the issue of break of chain of evidence and concluded that there was no merit to the contention that there was a break in the chain of evidence from the day the drugs were seized until the date of trial.

- [37] Although made in the context of a drug trafficking case, the principle espoused there is nonetheless applicable to this case. In the light of the fact
- C that the exhibits were already analysed by the chemist, the failure to produce the exhibits in court during trial was not fatal to the prosecution's case.

Prima Facie Case And The Maximum Evaluation Test

- [38] The prosecution had submitted during the course of hearing this appeal that the learned Sessions Court Judge had erred in failing to conduct a
- D maximum evaluation of the evidence of witnesses for the prosecution in coming to her findings.

- [39] The statutory duty upon a trial court at the end of the case for the prosecution is as stated in s. 180 and s. 173(f) of the Criminal Procedure Code (CPC). Both sections are set out in similar terms. It states that when
- E the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against court shall consider whether the prosecution has made out a *prima facie* case against the accused. Subsection 4 of s. 180 states, "For the purpose of this section, a *prima facie*
- F case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction". The phrase "*prima facie*" in s. 180 has not been statutorily defined. However, it has been the subject of judicial consideration and pronouncement.

- G [40] In the case of *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1, it was held as follows:

- The meaning of *prima facie* case in s. 180(1) of the Criminal Procedure Code must be understood in the context of a non-jury trial. A *prima facie* case arises when the evidence in favour of a party is sufficiently strong
- H for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those
- I facts existed or did happen. As this exercise cannot be postponed to the end of the trial a maximum evaluation of the credibility of the witnesses must be done at the close of the case for the prosecution before the court

can rule that a *prima facie* case has been made out in order to call for defence. Be that as it may, I am unable to agree with the defence submission that this means that the prosecution must prove its case beyond reasonable doubt at that stage. A case is said to have been proved beyond reasonable doubt only upon a consideration and assessment of all the evidence (see *Canadian Criminal Evidence* (3rd Edn) ... thus, a *prima facie* case as prescribed by the new s. 180(1) of the Criminal Procedure Code must mean a case which if unrebutted would warrant a conviction.

[41] In the case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 AMR 89, His Lordship Gopal Sri Ram JCA (as he then was) in his usual lucid style put it in this fashion:

In our respectful view the correct test to be applied in determining whether a *prima facie* case has been made out under s. 180 of the Criminal Procedure Code (and this would apply to a trial under s. 173 of the Code) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] 2 MLJ 232 at 270:

To summarise, it would therefore appear that having regard to the prosecution evidence adduced so far, a *prima facie* case has not been established against Nordin Johan and Abdul Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do so even though they are being tried under Emergency Regulations) the question is can they be convicted of the offence of s. 302 read with s. 34 of the Penal Code? My answer to the question is in the negative.

We are confident in the view we have just expressed because we find nothing in the amended s. 180 of the Criminal Procedure Code that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative intention of Parliament as expressed in the language employed by it to show that there would be a dual exercise by a judge under s 180 when an accused elects to remain silent as happened in *Pavone v. PP* [1984] 1 MLJ 77. In other words we are unable to discover anything in the language of the recently formulated s. 180 that requires a judge sitting alone first to make a minimum evaluation and then when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.

It therefore follows that there is only one exercise that that a judge sitting alone under s. 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: If I decide to call upon the accused to enter his defence and he remains silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

- A [42] In *Balachandran v. PP* [2005] 1 CLJ 85 Augustine Paul JCA (as he then was) held:

A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase “*prima facie* case” is defined in similar terms in *Mozley and Whiteley’s Law Dictionary*, 11th Edn as:

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- A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called to answer it. A *prima facie* case then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence has been established.

[43] The phrase ‘*prima facie*’ has also been admirably put in very succinct terms in the case of *PP v. Tan Sri Kasitah Gaddam* [2009] 1 LNS 741; [2009] 5 AMR 228 as follows:

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- A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of every prosecution witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence ... A maximum evaluation of the prosecution’s case does not mean that the prosecution must prove its case beyond a reasonable doubt at that stage. What it means is that the prosecution must prove each and every essential ingredients of the offence by credible and reliable evidence which has been filtered and sieved through the positive process of evaluation. There should not be any material gaps in the evidence (see *Abdullah Zawawi v. PP* [1985] 2 MLJ 16) and if the evidence admits of two or more inferences (see *Kasmin b Soeb v. PP* [1974] 1 MLJ 230 and *Abdullah Zawawi Yusoff v. PP* [1993] 2 AMR 2121; [1993] 4 CLJ), then the inference that is most favourable to the accused shall be drawn.

[44] A useful summing up of the phrase '*prima facie*' as distilled from case law is given in *Mallal's Criminal Procedure*, 7th edn, Lexis Nexis Malaysia Sdn Bhd at pp. 393 & 394 where it is stated:

The prosecution is said to have a *prima facie* case when the evidence in their favour is sufficiently strong for the accused to be called on to answer it. A *prima facie* case is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side. A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it would be sufficient to induce the court to believe in the existence of facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. A *prima facie* case as prescribed by section 180 of the CPC as amended means a case which if unrebutted would warrant a conviction.

[45] In the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 AMR 203 the Federal Court summarised the steps to be undertaken by a trial court at the end of the prosecution's case in the following terms:

- (i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from the evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
- (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that evidence is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "No" then, a
- (iii) *prima facie* case has not been made out and the accused should be acquitted;
- (iv) after the defence is called, the accused elects to remain silent, then convict;
- (v) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. PP* [1963] MLJ 263.

[46] From a distillation of the above mentioned authorities, it is therefore the duty of a trial court at the conclusion of the close of the case for the prosecution to undertake a maximum evaluation of the evidence of the witnesses for the prosecution. This involves the scrutiny of their evidence with a critical eye. Their evidence is not to be taken at face value. This evaluation also involves an assessment of the credibility of their evidence as tested against the circumstances of the case as a whole. It would involve an assessment of whether there exists any contradiction between the evidence

- A of each witness. Should more than one inference arise out of the evidence given, the inference favourable to the accused must be adopted. After the process of maximum evaluation is undertaken, the question must be asked, “if I call upon the accused to make his defence and he elects to remain silent, am I prepared to convict him on the evidence as it now stands.” If the answer to that question is yes, then, a *prima facie* case is made out but not if it is otherwise.
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- [47] Bearing all of the aforesaid in mind, even a cursory glance at the grounds of judgment by the learned Sessions Court Judge would indicate that apart from the citation of case law in respect of what amounts to a *prima facie* case and corroboration, there is little or no analysis at all of the evidence of the prosecution witnesses. The elements required to constitute the offence of rape and statutory rape were not considered in the grounds of judgment and no evaluation was carried out on the evidence in order to come to the finding that the prosecution had failed to make out a *prima facie* case against the accused. Further to that, there was no analysis and assessment of the evidence of PW2 as to why her evidence was incapable of belief or that she was not a credible witness and therefore her evidence should not be considered.
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- [48] Had the learned Sessions Court Judge embarked on a maximum evaluation assessment, she would have no doubt come to the finding that there was in fact ample evidence from PW2 and the other prosecution witnesses to prove the ingredients of the charges against the respondent.
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- [49] This court finds that based on the maximum evaluation test and on the evidence adduced by the prosecution, all the necessary ingredients of the offence of rape have been proven against the respondent and this court therefore finds that a *prima facie* case has arisen against him.
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Appellate Interference

[50] In the case of *P’ng Hun Sun v. Dato’ Yip Yee Foo* [2013] 1 LNS 320; [2013] 6 MLJ 523 the Court of Appeal observed that:

- G When the finding of the trial judge is factual, however the fact finder’s decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong (see *China Airline Ltd v. Maltran Air Corp. Sdn Bhd & Anor Appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Zahara bt. A. Kadir v. China Airline Ltd v. Maltran Air Corp. Sdn Bhd & Anor Appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Zahara bt. A. Kadir v. Ramuna Bauxite Pte Ltd & Anor* [2011] 1 LNS 1015; *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 1 LNS 1.
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The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that;

- I (a) By reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he or she did accept; or

- (b) In assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account; or A
- (c) It unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or B
- (d) In so far as the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witness which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer. C

Decision Of The Court

[51] In so far as this appeal is concerned and for the reasons advanced earlier, it is the finding of this court that this is a proper case warranting appellate interference as the learned Sessions Court Judge had failed to take into account the fact that on a maximum evaluation of the evidence, the prosecution had made out all the necessary ingredients of the offence of rape. D

[52] The court therefore allows the appeal by the Public Prosecutor and reverses the order of the Sessions Court. It is also the order of this court that this case be remitted back to the Sessions Court with an order for the defence of the respondent to be called on the charge of rape under s. 376 of the Penal Code. E

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